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ABSTRACT

This chapter examines court cases reported during 1987 of tort claims involving school officials, employees, and students. A tort is a civil wrong, other than breach of contract, for which a court provides relief in the form of damages. The most common tort alleged to have been committed by school personnel is negligence. Most negligence suits against schools result from student injuries during school hours, enroute to and from school, on school facilities, or during school activities. Other topics discussed include cases arising from liability insurance claims and employee injuries or workers' compensation claims as well as cases involving assault and battery, defamation, products liability, and intentional infliction of emotional distress. The final section focuses on constitutional torts, that is, cases alleging violation of litigants' constitutional rights. (MLF)

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TORTS

William J. Evans, Jr.

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INTRODUCTION

The purpose of tort law is to provide remedies to individuals for harm which resulted from the unreasonable conduct of others. A tort is a civil wrong, other than breach of contract, for which a court provides relief in the form of damages. State laws provide the basis for most

actions, which are predicated on the principle that individuals are responsible for the consequences of their conduct.[1] The major categories into which tort actions can be grouped are: negligence, which involves conduct that falls below an acceptable standard of care resulting in injury; intentional torts, where such actions as assault, battery, defamation, trespass, and false imprisonment are committed with the desire to do harm; and strict liability, where an injury results from the creation of an unusual hazard.[2]

Most of the more common torts developed historically and have been recognized for centuries. But tort law is not static and the emphasis on the type of duty owed by one individual to another shifts. For example, the areas of constitutional and educational malpractice torts have emerged relatively recently in school law. Yet, educational malpractice cases are rapidly disappearing, while there has been a steady increase in litigation involving constitutional torts.

This chapter examines those cases reported during 1987 which involved tort claims within the school context. Cases included involve school officials, employees, and students. Torts arising out of physical education and intramural sports participation are included, but those involving interscholastic or intercollegiate sports participation are not included as they are discussed in a separate chapter.

NEGLIGENCE

The most common tort alleged to have been committed by school personnel is negligence. Such a charge can result when an improper act, or a failure to act, causes injury to another person. For negligence to exist, the person causing the injury must fail to exercise a standard of care commensurate with the risks involved and the duty owed to the injured party.

There must be a causal relationship between the alleged negligent conduct and the injury sustained. In negligence cases, questions of law are determined by judges, while questions of fact are decided by juries.

Student Injuries

Schools are responsible for maintaining a safe and healthy environment in which learning can take place. The following cases illustrate how injuries to students resulted in a variety of lawsuits with varying outcomes.

Off School Property and After School Hours. Whether a

1. *See generally*, W. Prosser, Law of Torts (4th ed. 1971).
2. *See* M. McCarthy & N.H. Cambron-McCabe, Public School Law (1987).

school district can be held liable for injuries suffered by a student off school property and after school hours was examined in a California case.[3] A teacher stopped his van near a group of boys to determine if they were engaged in any improper conduct. As he pulled away, one of the students who had climbed onto his bumper fell injuring his head. In affirming the trial court's summary judgment for the district, the court of appeals found no duty owed by the district to the student. The student was not on his way to or from school, and the fact that the teacher initiated contact with the boys did not impose liability upon his employer.

School Settings During School Hours. Two cases involved injuries to students which occurred while the teacher was out of the classroom. A New York student, who was assaulted by another student, brought an action for damages against the school district.[4] During the approximately ten minutes the teacher was gone, a student from another class entered the room and starting fighting the plaintiff. During the course of the fight the student threw a desk at the plaintiff causing him serious physical injury. The trial court's dismissal of the action was affirmed by the appeals court. The complaint was found to have failed to state a cause of action as it did not allege that the school knew or should have known that the student who assaulted the plaintiff had a history of violent behavior which would pose a threat to other students.

A fourth grade student in Illinois brought a personal injury action against his school, principal, and teacher in connection with an injury where the student lost the sight of one eye.[5] The accident took place in the classroom while the teacher was in the hall supervising the movement of her students from the gymnasium area to the classroom. The circuit court entered judgment on a jury verdict in favor of the teacher, school, and principal. The court of appeals affirmed the decision recognizing that a teacher cannot supervise every child at all times while in school. There was no history of poor behavior by students when the teacher was briefly away from the classroom, and the teacher was following her normal course of conduct. In affirming the decision, the court pointed to the tremendous burden that would be imposed by a different decision.

Two cases involved supervision of students during their lunch period. In Florida, a student who was beaten by other students while outside his school cafeteria, brought suit for injuries against the school

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3. Torsiello v. Oakland Unified School Dist., 242 Cal. Rptr. 752 (Ct. App. 1987).
4. McLoughlin v. Holy Cross High School, 521 N.Y.S.2d 744 (App. Div. 1987).
5. Albers v. Community Consol. No. 204 School, 508 N.E.2d 1252 (Ill. App. Ct. 1987).

board, principal, and teacher.[6] The trial court dismissed the complaint and the student appealed. The court of appeals upheld the dismissal of the action against the principal and teacher, but reversed concerning the school board. The complaint alleged the negligent breach of the duty to supervise by asserting that no teacher was posted to keep order in the cafeteria, and that the beating was near enough to alert a teacher if one had been posted. The school board argued that how and where to disperse the school's limited supervisory personnel was discretionary and not actionable. The court failed to recognize that position as the complaint did not challenge where the limited personnel would be, but alleged that no supervisory personnel were present at all. In remanding this portion of the action for trial, the court pointed to the board's common law and statutory duty to supervise students.

In the second instance, the parents of a Louisiana special education student brought suit against the school board on behalf of their daughter.[7] At the time of the accident the fourteen-year-old student had a mental age of six years, with motor skills development categorized as four years, two months. The accident occurred while the student was standing in a breezeway adjacent to the school's lunchroom and was bumped by two nonhandicapped students engaged in horseplay. The trial court found the school board at fault for creating an unreasonable risk of harm when the handicapped student was allowed to travel alone near a concession stand where horseplay was common. The court of appeals reversed the decision explaining that the school board was required by law to place the student in the least restrictive program. The area where the accident occurred was determined to be well supervised, and the accident happened so quickly that even one-on-one supervision would not have prevented the accident.

A New York trial court found a school district 75% at fault for an injury sustained during recess by a fifth-grade student. The appellate court reversed that decision finding that the plaintiff failed to establish a prima facie case.[8] The injury took place during a game in which children ran and tried to push through a line of other children linked hand to hand. Although the game was specifically prohibited, it had been played for a few moments before the injury occurred. At the time of the accident, five school aides and one teacher were on duty supervising 250 to 275 children. The court saw the supervision as reasonable and determined that the school personnel had no actual or constructive notice that

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6. Comuntzis v. Pinellas County School Bd., 508 So. 2d 750 (Fla. Dist. Ct. App. 1978).
7. Brooks v. Saint Tammany Parish School Bd., 510 So. 2d 51 (La. Ct. App. 1987).
8. Totan v. New York City Bd. of Educ., 519 N.Y.S.2d 374 (App. Div. 1987).

the game was in progress. Therefore, there was no reasonable opportunity to prevent its continuance prior to the student's injury.

The issue of foreseeability was at the center of a case which was brought on behalf of a fourth-grade student who was abducted from school and raped.[9] The trial court's judgment for the student was appealed by the school district. Testimony showed that school security was deficient, with an open rear gate, broken doors, malfunctioning intercom, and the presence of adult males who freely roamed throughout the school. These factors, plus a history of violent activity in the surrounding neighborhood, were seen by the court of appeals as enhancing the foreseeability of dangers from intruders. This, the court explained, created a duty on the part of district officials to protect the students from such activity.

In New York, a high school student sought to recover damages for injuries caused when he was assaulted by armed individuals on the front steps of his school.[10] The trial court's rejection of that claim was affirmed by the court of appeals. In being outside the school building at the time of the incident, the student was in violation of rules promulgated for the protection of students. The measures taken to insure school safely were not found to have created a special duty to him.

The four cases which involved injuries related to gym or physical education classes had a variety of outcomes. An eighth grade student in New York, who was injured by another student while participating in a wiffleball game during gym class, brought suit against the school district alleging negligent supervision.[11] The Supreme Court, Appellate Division upheld the lower court ruling absolving the district of liability. The court recognized that a school cannot be an insurer of student safety, yet it is liable for a foreseeable injury proximately related to the absence of supervision. In this instance, the student causing the injury did not have a disciplinary record showing such a strong propensity toward violence as to warrant special supervision. The teacher was only twenty-five feet from where the altercation took place and he took immediate action. Since the school district was not found to be negligent, the court did not need to examine the issue of proximate cause.

A Michigan high school student brought an action against his school district and physical education instructor for injuries sustained during

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9. District of Columbia v. Doe, 524 A.2d 30 (D.C. 1987). *See* Jones v. City of Albany, 513 N.Y.S.2d 554 (App. Div. 1987) (school district's motion for summary judgment denied as evidence presented questions of fact on whether a student's conduct and resulting injuries were reasonably forseeable).

10. Salmond v. Board of Educ., 517 N.Y.S.2d 90 (App. Div. 1987).

11. Hanley v. Hornbeck, 512 N.Y.S.2d 262 (App. Div. 1987).

physical education class.[12] The student was thrown to the ground and seriously hurt during a touch football game. The plaintiff alleged that the instructor failed to adequately supervise and instruct the class, and failed to intervene when the players began to use excessive force. Specifically, it was alleged that the instructor was reading his morning newspaper rather than supervising the class. The circuit court found in favor of the school district and teacher, and the plaintiff appealed. The court of appeals reversed the holding regarding the teacher finding his lack of supervision to be a ministerial act and therefore not protected from tort action.

While enrolled in a high school swimming class, a Pennsylvania student struck his head on the bottom of the pool after attempting a dive at the shallow end. The accident left him paralyzed, and was the basis for his action against the swimming instructor and school district.[13] The Supreme Court of Pennsylvania reversed the trial court's decision against the student and remanded the case for a new trial. In particular, the court held that the trial judge abused his discretion by permitting opinion evidence by an expert witness. The expert's testimony stated that the plaintiff was completely responsible, and addressed the totality of the evidence. The court saw that responsibility as more appropriate for the jury.

The *in loco parentis* immunity of an Illinois school was at issue in a case involving a third-grade student injured during physical education class.[14] The school board was charged with breaching its duty to exercise reasonable care by negligently furnishing baseball bats intended for use by adults. These were alleged to be too heavy to be safely held and swung by children. The circuit court dismissed the action against the school board, and the student appealed. Reversing that decision and remanding the case for trial, the appeals court expressed a concern for relieving school boards of liability for acts which do not fall clearly within the doctrine of educational immunity.

A high school teacher in Oregon, who was convicted of deviate sexual intercourse with a person under sixteen years of age, was sentenced to a prison term of five years. Although the court of appeals affirmed the decision, the Supreme Court of Oregon reversed and

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12. Hyman v. Green, 403 N.W.2d 597 (Mich. Ct. App. 1987). *See also* Merkley v. Palmyra-Macedon Cent. School Dist., 515 N.Y.S.2d 932 (App. Div. 1987) (whether a teacher's actions, standing fifteen yards away from a group throwing a shot-put and supervising two activities at the same time, proximately caused a student's injury was seen as requiring a jury trial).

13. Kozak v. Struth, 531 A.2d 420 (Pa. 1987).

14. Ausmus v. Board of Educ., 508 N.E.2d 298 (Ill. App. Ct. 1987).

remanded the case for a new trial.[15] The court held that expert testimony concerning methods that a person who sexually abuses children will use to get close to the victim was not admissible. However, the evidence of communications between the child's psychotherapist and the child should have been admitted as the psychotherapist-patient privilege cannot be a ground for excluding evidence regarding the cause of a child's abuse, or the abuse itself.

A New York teacher was convicted of sexual abuse and endangering the welfare of a child. The court of appeals upheld that decision, rejecting the plaintiff's claims of reversible error.[16] The plaintiff sought the right to question the investigating officers in an attempt to establish that they suggested or coerced the accusation against him. The court refused to allow this, finding the method in which the children were questioned to be a collateral issue. The use of photographs of the alleged victims were found admissible for the limited purpose of refreshing the jury's memory of their testimony.

In California, a child brought an action against the school district for sexual assault committed by her teacher.[17] The trial court dismissed the case and the plaintiff appealed. The appeals court reversed that decision recognizing the duty owed by the district to the student. The court pointed to the recent amendment to the state constitution which included the guaranteed right to safe schools, and the child abuse reporting law. Citing the great authority and trust given to teachers, governmental entities such as school districts were seen by the court as liable for intentional torts committed by their employees.

The mother of a child with cerebral palsey sought to envoke the concept of negligent discipline in an action brought against the school district, bus driver, principal, and nurse.[18] It was alleged that while the

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15. State v. Hansen, 743 P.2d 157 (Or. 1987). *See* Pesce v. J. Sterling Morton High School Dist. 201, 830 F.2d 789 (7th Cir. 1987) (school psychologist's substantive and procedural due process rights were not violated when school board disciplined him for failure to disclose suspected abuse of student by teacher).

16. People v. Hudy, 521 N.Y.S.2d 811 (App. Div. 1987).

17. Kimberly M. v. Los Angeles Unified School Dist., 242 Cal. Rptr. 612 (Ct. App. 1987). *But see* State v. Woodley, 746 P.2d 227 (Or. Ct. App. 1987) (second degree sexual abuse charge against girl's basketball coach is not supported by the touching of thigh area and area between female breasts); Scott v. Blanchet High School, 747 P.2d 1124 (Wash. Ct. App. 1987) (where parents could not recover for negligent hiring of teacher who became sexually involved with student); and Cohen v. Wales, 518 N.Y.S.2d 633 (App. Div. 1987) (where plaintiff claimed district negligently recommended a teacher for employment without disclosing alleged sexual misconduct eleven years earlier, the recommendation of a person for employment was not held a proper basis for such an action).

18. Hopkins v. Spring Indep. School Dist., 736 S.W.2d 617 (Tex. 1987). *See* Braun v. Board of Educ., 502 N.E.2d 1076 (Ill. App. Ct. 1986) (where board was not guilty of willful and wanton misconduct for failing to disseminate appropriate information about a student's epileptic condition).

student was unsupervised she was pushed into a stack of chairs and sustained a head injury. Help was not summoned and she was not sent to the nurse. Later, while riding home on the school bus, the student suffered severe convulsions. The mother claimed that the school personnel's gross negligence dramatically decreased the child's life expectancy. The trial court and court of appeals granted a summary judgment for the defendants. The Supreme Court of Texas agreed, rejecting the mother's broad interpretation of the term discipline under which it was claimed that the child was disciplined by submitting to the authority and control of her teacher, the school nurse, and other employees. In addition, there was no exception to the school district's immunity as the bus only provided the setting for the injury, and was not the proximate cause.

The issue presented in a New York case was whether a school district can be held liable for injuries incurred by a truant student who was involved in an automobile accident a considerable distance from the school at a time beyond normal school hours.[19] On the day in question the student reported late for school, received a pass to enter the detention room, and left the building without permission. The student spent much of the rest of the day joy-riding until the accident. The plaintiffs contended that the school district breached its duty of supervision, care, custody, and control by allowing the student to leave the building. In addition, the district's failure to report the student's unauthorized absence to his mother or law enforcement officials, and failure to maintain adequate attendance and/or truancy control policies were cited. In granting the school district a summary judgment, the court found that nothing short of a prison-like atmosphere could have prevented the student from leaving the school, and that it would be improper to mandate that a school district employ such measures.

En route to and from School. Five cases involved accidents involving students crossing streets to get to, or leaving from, a school bus. In Georgia, a ten-year-old student was struck and killed as he was crossing a heavily travelled highway to get to a bus stop. In the wrongful death action brought by the child's parents, the trial court granted a summary judgment in favor of the liability insurer of the school board. The court of appeals reversed that decision and determined that there was a question of fact as to whether the child's attempt to cross the highway occurred in the process of "loading" the bus.[20] The court

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19. Palella v. Ulmer, 518 N.Y.S.2d 91 (Sup. Ct. 1987).

20. Cawthon v. Waco Fire & Casualty Ins. Co., 358 S.E.2d 615 (Ga. Ct. App. 1987). For another case involving the judgment of a bus driver see Knickles v. United Cab Co., Inc., 505 So. 2d 114 (La. Ct. App. 1987) (driver whose school bus struck a parked cab was not negligent in making a right turn when faced with a sudden emergency).

pointed to the fact that the driver had previously told the student that he must be outside waiting for the bus, and that if he was not, the bus would leave without him. Furthermore, a question of fact existed as to whether the driver explicitly ordered the child to cross the highway prior to the arrival of the bus.

A wrongful death action was brought on behalf of an eleven-year-old Minnesota student who was killed while crossing the street after disembarking a bus.[21] The city bus was operating under a contract between the school district and the transit authority. Eligible students lived more than two miles from school and paid no fare. Noneligible students, including those who lived less than two miles from school, were required to pay a fare. The contract was seen as contemplating the transportation of both eligible and noneligible students because of the location of bus stops within the two-mile limit. The deceased lived within the two-miles. The district court decision for the defendants was reversed by the court of appeals. The bus had been operating without a stop signal arm, pre-warning flashing amber lights, or flashing red signals as required by law. The court found that by acting as a school bus, the safety feature requirements must be met. The district's duty to the students within the two-mile limit was acknowledged as it could be reasonably anticipated that those students would use the bus. No distinction was seen between the paying and nonpaying students which would relieve the school district of liability.

Parents of a student who was injured while trying to cross the road to get to his school bus, brought an action against the transportation division of the state board of education, assistant state superintendent of transportation, school district, bus driver, and bus company.[22] The New Mexico district court granted summary judgment in favor of the state defendants and school district. The court of appeals affirmed that portion of the decision which granted immunity to the state defendants. Since the state had no authority to employ the bus driver or to operate school buses, it had no liability for injury to the plaintiff who was struck by a school bus. Whether the school district was immune was determined to be a question for the jury. The issue of possible negligent operation of the bus by the driver, as well as possible contributory negligence by the student, were held to preclude a summary judgment for the defendant school district.

When a twelve-year-old New York girl missed her school bus, she was struck by an automobile as she hurried to a later stop on the bus route. In the student's action against the school district, the trial court

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21. Jam v. Independent School Dist., 413 N.W.2d 165 (Minn. Ct. App. 1987).
22. Chee Owens v. Leavitts Freight Serv., 745 P.2d 1165 (N.M. Ct. App. 1987).

denied the district's motion for a summary judgment and the district appealed. In reversing that decision, the appeals court agreed that the district owed the student a duty of care. However, the court pointed out that care must be taken to avoid confusing duty, which is a question of law, with breach, which is a question of fact. In this instance no breach of duty was found as a school district is not an insurer of the safety of children as they travel to and from the place where the school bus picks up or discharges them. The court also rejected the contention that the district deviated from its policy by allowing students to board buses at more remote, less safe locations. There was no indication that the district directly communicated to parents that it had assumed a special duty to students at their assigned stops, and then breached that duty by allowing students to board at stops other than their own.[23]

After a child was injured while crossing a highway on the way to school, his father brought suit against the Pennsylvania borough and commonwealth. The trial court dismissed the complaint and the father appealed.[24] In affirming that decision, the appeals court held that the commonwealth had exclusive authority over the state highway, and therefore the borough had no duty to establish a school zone. Furthermore, the borough had no duty to warn or give notice to the commonwealth of any dangerous condition.

An Illinois high school student brought an action against her school district for injuries incurred while walking home from school.[25] The accident occurred as the plaintiff followed her usual route, which included a footpath from the end of the sidewalk along the crest of an embankment that had been constructed at the end of a running track which surrounded the football field. On the day in question, a fence used for crowd control during the football season was in place and blocked access to the footpath at the top of the embankment. At one point the plaintiff stepped onto the pavement and was struck from the rear by an automobile. Following a jury trial, judgment was entered for the student. On appeal by the school district, the appellate court found that no duty was owed to provide a safe place for pedestrians to walk where there was no sidewalk. The court disagreed with the plaintiff's contention that the school district had designed and constructed an unreasonably dangerous condition on its property. The fence itself was not seen as dangerous, and the fourteen-year-old plaintiff was determined to be old enough to appreciate the danger of stepping onto the pavement of a two-lane roadway. Furthermore, plaintiff was not en-

23. DiCerbo v. Raab, 516 N.Y.S.2d 995 (App. Div. 1987).
24. Walch v. Red Hill Borough, 532 A.2d 1238 (Pa. Commw. Ct. 1987).
25. Frakes v. Martin, 503 N.E.2d 556 (Ill. App. Ct. 1987).

gaged in a school activity, and was going home by a route of her own choosing.

School Buildings and Grounds. The Supreme Court of Oregon presented an analysis of the concept of foreseeability in a case arising out of the assault and rape of a fifteen-year-old student.[26] The girl was assaulted as she was about to enter the school building almost an hour before school was to begin. The court determined that whether the school district was negligent in not providing supervision for students who arrived before school began, or for failing to issue precautionary warnings, was a question for the jury. The court cited the school's duty of supervision, not only to a student whose conduct injures the plaintiff, but to students who are injured by others or by themselves. "Negligence toward a student," the court explained, "is tested by an obligation of reasonable precautions against foreseeable risks beyond those that might apply to other persons."[27] It was concluded that a sensible school administrator would have taken precautions by providing either supervision or at least a warning to students and their parents of the absence of supervision before school. The attack was seen as particularly foreseeable as there was evidence of a sexual assault on a woman on school grounds fifteen days before the attack on the plaintiff.

In Illinois, a student was injured in the boy's gymnasium when he fell against an unprotected concrete riser. An action alleging negligence against the school district was brought by the student's parents.[28] The circuit court dismissed the action, and the parents appealed. The court of appeals reversed that decision and remanded the case for trial. The court saw the alleged negligence as separate from supervision and related to the furnishing of defective equipment. Therefore, the district became liable for furnishing equipment which, in the exercise of ordinary care, it should have known could cause injury to the plaintiff.

School-related Activities. A West Virginia student fell from bleachers knocking a teacher to the floor injuring her. The teacher brought a personal injury action against the student, who subsequently brought a third-party action against the school district alleging willful, wanton, and reckless misconduct in failing to install detachable guard

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26. Fazzolari v. Portland School Dist., 734 P.2d 1326 (Or. 1987). *See* Toure v. Board of Educ., 512 N.Y.S.2d 150 (App. Div. 1987) (where the matter of whether a board's duty to provide schoolyard supervision between 8:00 a.m. and 8:25 a.m. was deemed a question for the jury).

27. *Id.* at 1338.

28. Prest v. Sparta Community Unit School Dist., 510 N.E.2d 595 (Ill. App. Ct. 1987). *See* Gordon v. Board of Educ., 510 N.Y.S.2d 824 (Civ. Ct. 1987) (where student who was injured when he placed his hands on the wired glass panel of a high school fire door failed to have the amount of his judgment raised as the court did not have jurisdiction).

rails on the sides of the bleachers.[29] The circuit court found for the student on the third-party claim, and the board of education appealed. In reversing that decision, the appeals court agreed that the failure to install the railings was arguably negligent, but did not constitute the kind of gross negligence necessary to hold the board liable.

A minor who was served alcohol at a series of graduation parties brought suit against two hosts and a hotel after falling from a balcony and sustaining serious injuries.[30] The fundamental question was the extent of social host liability for the service of intoxicating beverages to a minor. The Supreme Court of Pennsylvania found that adults do have a duty of care, and that duty is breached with the service of any alcohol, not just an amount sufficient to intoxicate the minor.

A Minnesota vocational school student was injured in an automobile accident after leaving a school sponsored "Bowl-A-Thon." The student's action against the school district and its employees claimed there had been negligent supervision of intoxicated students.[31] In upholding the decision of the lower court, the court of appeals explained that Minnesota's Civil Damages Act precluded actions based on negligent supervision.

EDUCATIONAL MALPRACTICE

The attempt to draw a distinction between educational malpractice and educational negligence was at issue in a New York case.[32] After a kindergarten student was administered an IQ test, she was placed in a class for retarded children. Three years later the child was re-diagnosed as deaf and placed in the proper class. The action against the school district alleged willful and wanton negligence. The court of appeals reversed the lower court's decision and refused to recognize educational negligence as an independent cause of action. Seeing the claim as one of educational malpractice, the court pointed out that based on public policy considerations, courts have uniformly refused to enter the classroom on such claims.[33]

In New Mexico, parents brought suit for damages following a

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29. Miller v. Gibson, 355 S.E.2d 28 (W. Va. 1987).

30. Orner v. Mallick, 527 A.2d 521 (Pa. 1987).

31. Beseke v. Garden Center, Inc., 401 N.W.2d 428 (Minn. Ct. App. 1987). *But see* Westbrook v. Board of Educ., 724 S.W.2d 698 (Mo. Ct. App. 1987) (where the court found a regulation requiring teachers to use reasonable care to look out for the safety of students during a trip was mandatory and not unduly vague).

32. DeRosa v. City of New York, 517 N.Y.S.2d 754 (App. Div. 1987).

33. *Id.* at 933. *See* Paladino v. Adelphi Univ., 454 N.Y.S.2d 868 (App. Div. 1987); Hoffman v. Board of Educ., 424 N.Y.S.2d 376 (N.Y. 1979); Donohue v. Copaigue Union Free School Dist., 418 N.Y.S.2d 375 (N.Y. 1979).

teacher's alleged distribution of marijuana to students. The trial court dismissed the action, and the parents appealed. The plaintiff's alleged educational malpractice, negligence in hiring and retaining the teacher, breach of contract, and a violation of constitutional rights. In affirming the lower court decision, the court of appeals addressed a number of issues.[34] Immunity was not found to have been waived involving the hiring and retaining of the teacher. Educational malpractice, if it exists, was seen as a form of negligence over which the court would have no jurisdiction without a waiver of immunity. The right to a free public education was not found to create a contractual relationship. The only authority cited by the plaintiffs were the writings of John Locke and Thomas Hobbes. The court did not view the social contract exposed by these early thinkers to translate to an enforceable contract between the government and its citizens. The fact that citizens pay taxes, was not found to create a contractual relationship. There are those who pay taxes but have no children, or have children who attend private schools. Finally, the civil rights claim was rejected because there was no allegation that the defendant, through custom of policy, ever sanctioned the distribution of marijuana to its students.

NEGLIGENCE DEFENSES

Immunity

The most commonly used defense has been governmental (sovereign) immunity. Traditionally, courts have been reluctant to disturb that defense as school districts are state agencies created by state law to perform a governmental function. Increasingly, however, there have been legislative and judicial inroads restricting the use of this defense.

Common Law (Governmental Immunity). A Missouri student who had been assaulted by her classmates brought a personal injury action against the school district. The circuit court granted the district's motion to dismiss the case. The court of appeals affirmed that decision, rejecting the idea that the district was a municipal corporation. The district was seen as an arm of the state and therefore entitled to immunity.[35]

In Pennsylvania, a person attending a luncheon at a high school

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34. Rubino v. Carlsbad Mun. School Dist., 744 P.2d 919 (N.M. Ct. App. 1987).

35. Taylor v. Klund, 739 S.W.2d 592 (Mo. Ct. App. 1987). In Krikorian v. Barry, 242 Cal. Rptr. 312 (Ct. App. 1987) a psychologist who was statutorily required to report suspected cases of child abuse, was immune from liability arising from the collection of data and observation and examination of suspected victims of child abuse. In Camp v. Sarratt, 354 S.E.2d 390 (S.C. 1987) release of claim against the state of South Carolina served to preclude an action against the school district.

brought an action for injuries suffered after ingesting a piece of plastic which was in his food. The school district had rented out the facility and agreed to serve lunch. The trial court found the district immune from liability, and that decision was upheld on appeal.[36] Those findings rejected the arguments that the school district was performing a proprietary rather than a governmental function, and that by serving food the district was strictly liable.

A New York City teacher sought to hold the board of education liable for negligently failing to provide security resulting in assault and robbery.[37] The public address system was not functioning in his room and therefore he and his students failed to hear that classes had been dismissed because of the Thanksgiving holiday. The teacher alleged that he relied upon the presence of security guards, who were allegedly absent from their posts at the time of the attack. In affirming the trial court's decision, the New York Supreme Court, Appellate Division explained that a governmental agency cannot be held liable for negligent acts committed in the performance of its governmental function, absent a special relationship between the injured party and the public entity. The plaintiff was unable to demonstrate that the security measures at the school were intended specifically for him, or for a class of persons of which he was a member.

A South Dakota teacher brought action against his school district, superintendent, principal, and a parent asserting tort claims arising from three incidents.[38] The teacher claimed that (1) the principal intentionally prevented him from leaving a meeting where the parent assaulted him, thus subjecting him to a threatening environment, (2) the superintendent threatened and physically detained him during a meeting concerning the teacher's evaluation, and (3) the superintendent made defamatory statements about him in the presence of students. The circuit court entered a summary judgment in favor of the school district, superintendent, and principal. The Supreme Court of South Dakota reversed that decision and remanded the case for trial by determining that the principal and superintendent could not be shielded by immun-

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36. Amacher v. Clarion Area School Dist., 530 A.2d 525 (Pa. Commw. Ct. 1987). *But see* Shultz v. Brentwood, 725 S.W.2d 157 (Mo. Ct. App. 1987) (where the city was not entitled to sovereign immunity as running its day care center and preschool were not found to be governmental duties, but rather propriatary in nature since they were operated for profit).

37. Weinstein v. Board of Educ., 511 N.Y.S.2d 882 (App. Div. 1987).

38. Bego v. Gordon, 407 N.W.2d 801 (S.D. 1987). Another case which featured a successful immunity defense was Miller v. Emelson, 520 A.2d 913 (Pa. Commw. Ct. 1987) where a malicious prosecution action, brought against a school district and its directors following a teacher's strike, was barred by general immunity.

ity. Their alleged acts were seen as intentional torts not offered such protection.

An adult evening student in New Jersey was struck by an automobile while crossing a road to get to the school. Her car had been parked across the street because of the limited parking on school property. The action she took against the school board was settled by the trial court with a summary judgment for the board, a decision which was affirmed by the court of appeals.[39] Using a novel approach to governmental tort liability, the plaintiff claimed that the school property itself was in a dangerous condition because of its limited number of parking spaces. The contention was that it was reasonably foreseeable that an adult evening student en route to class would park across the street and from there jaywalk across the road and be struck by a vehicle. Rejecting that argument, the court held that government liability for a dangerous condition of property cannot be premised upon a dangerous activity by a third party somewhere off the property.

A woman who was descending aluminum risers at a city convention center in order to be seated at a high school graduation, fell and sued the board of education and the city for her injuries.[40] The New York trial court dismissed the action and the plaintiff appealed. The court of appeals allowed the action against the city, but held that the school district could not be held liable. The district had leased the premises and therefore was not responsible where it had no control of the premises. No duty was found to warn of an alleged defective or dangerous condition.

Statutory Immunity. A New Mexico student who was struck and injured by a fellow student while on school property, brought suit against the school board.[41] The district court denied a motion to dismiss the action and the board appealed. Citing the provisions of the Tort Claims Act, the court of appeals reversed that decision. The plaintiff had contended that negligent supervision of students was an exception to the board's immunity. This claim was denied since the portion of the Tort Claims Act relied upon by the plaintiff only waived immunity for damages resulting from the negligent operation or maintenance of a building. Where the areas of waiver of immunity are specifically presented, the court explained, they have no authority to read other exceptions into the statute.

In Pennsylvania, a man who was injured on school property brought

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39. Ross v. Moore, 533 A.2d 398 (N.J. Super. Ct. App. Div. 1987).

40. Elmlinger v. Grand Island Board of Educ., 518 N.Y.S.2d 257 (App. Div. 1987).

41. Pemberton v. Cordova, 734 P.2d 254 (N.M. Ct. App. 1987). *See also* Stout v. Grand Prairie Indep. School Dist., 733 S.W.2d 290 (Tex. Ct. App. 1987) (school district immune from liability for injury to student during cheerleader practice).

an action against the school district.[42] The accident took place during a community day celebration when, while helping out on a hayride, he fell and was seriously injured. The trial court upheld the school district's assertion that (1) the district did not exercise supervision, direction, or control over the community day affairs, and (2) the district was immune from tort liability. That decision was affirmed by the Commonwealth Court of Pennsylvania explaining that liability for negligence is imposed only when government owned property is made unsafe for the activities for which it is regularly used. A student who injured his eye while using a wood lathe in an industrial materials course brought suit against the school district. A Pennsylvania jury returned a verdict for the student and the district appealed.[43] At issue was whether the 800 pound lathe was an individual piece of equipment, or a part of the reality in which case its care, custody, and control would fall within the real property exception to governmental immunity. The appeals court reversed the earlier decision and ordered a new trial. The unbolted lathe, which was attached to the property by only electrical wire and gravity, had previously been moved to another classroom and was not held to be a fixture.

The decision by a trial court, that a school district was immune from liability for an accident which took place on school property, was reversed by a Pennsylvania appeals court.[44] A student, who was injured when another student struck her with his automobile, had sought exception to the school's immunity. The school district was alleged negligent with respect to design and maintenance of its streets, sidewalks, and traffic controls. In remanding the case for trial, the appeals court explained that there was no requirement that a physical defect be present in order to fall under the streets or sidewalks exception to immunity where defective design is alleged.

The administratrix of a child's estate brought action against the school district to recover damages for a child killed when he fell through a school skylight.[45] The twelve-year-old fell after he climbed onto a trash dumpster and then onto the school roof to retrieve a ball. Appeal was sought after the Pennsylvania trial court dismissed the complaint. The appeals court reversed that decision finding that, although the incident took place on Easter Sunday, the victim was not an intentional trespasser involved in an unforeseeable accident. The general use of the school yard was for recreational purposes, and it was open to neigh-

42. Carl v. Banks Engineering Co., 525 A.2d 877 (Pa. Commw. Ct. 1987).
43. Canon-McMillan School Dist. v. Bioni, 533 A.2d 179 (Pa. Commw. Ct. 1987).
44. Dorsch v. Butler Area School Dist., 525 A.2d 17 (Pa. Commw. Ct. 1987).
45. Stahl v. Cocalico School Dist., 534 A.2d 1141 (Pa. Commw. Ct. 1987).

borhood children after school and on weekends. For the purposes of a real property exception to the school's immunity, the conduct alleged in the complaint was seen as directly related to the condition of the property. Allegations were made relating to a physical defect in the skylight, and this together with the district's awareness of potential serious injury to children, stated a cause of action for an exception to governmental immunity. Thus the matter was remanded for further proceedings.

In Michigan, a sixteen-year-old student was learning how to use a milling machine during shop class when his gloved hand became caught in the unguarded rotary cutting mechanism severing a finger and nearly severing his thumb. The suit against the school sought a defective building exception to the school's governmental immunity. In affirming the trial court's decision for the school, the court of appeals held that classroom equipment used for instructional purposes is not a part of the reality.[46]

While a high school student in Texas was waiting to board her bus home, she was struck by an automobile driven by another student. In the action her father brought for damages, the district court entered a summary judgment for the school district.[47] On appeal, the father sought to establish the motor vehicle exception to the school's immunity. The court of appeals explained that to prevail the damages must have been proximately caused by the negligence of an employee acting within the scope of his authority and arising from the use of a motor vehicle. As the vehicle in this case was not owned or operated by any agent of the school district, that exception was not found to apply.

Also in Texas, a court of appeals reversed a trial court's summary judgment in an accident involving a school bus. There were material issues of fact as to whether a school bus operator had properly activated flashers to indicate that the bus was slowing before stopping to discharge school children. In remanding the case for trial, the court found sufficient evidence of acts which could fall under the motor vehicle exception to governmental immunity.[48]

Other Defenses

Notice of Claim. Defenses other than claims of immunity can apply to negligent tort actions. The timely notice of claim requirement is designed to allow defendants an opportunity to investigate a claim

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46. Velmer v. Baraga Area Schools, 403 N.W.2d 171 (Mich. Ct. App. 1987). *But see* Barbin v. State, 506 So. 2d 888 (La. Ct. App. 1987) (a student attending school for the deaf recovered for injuries suffered in woodworking class).
47. Heyer v. North East Indep. School Dist., 730 S.W.2d 130 (Tex. Ct. App. 1987).
48. Hitchcock v. Garvin, 738 S.W.2d 34 (Tex. Ct. App. 1987).

while the facts surrounding it are still recent. Failure to make a timely notice can be grounds for the dismissal of a complaint.

In South Carolina, a student brought an action against her former teacher for injuries sustained when a glass tube broke or exploded during a chemical experiment.[49] The state of South Carolina maintained an insurance policy which covered the teacher for personal liability. Although the teacher gave the suit papers to her principal, the school authorities failed to timely notify their attorney or the insurance company. The trial court refused the teacher's motion to vacate a default judgment as to liability. While the teacher's negligence in not answering was seen as excusable, the school board's lack of action was not. The court of appeals reversed that decision explaining the general rule that when an employee hands suit papers to his employer, and the employer fails to properly answer the papers, the courts grant relief to the defaulting defendant in the interest of trying cases on their merits.

Michigan school faculty members and their spouses brought an action against an engineering firm based upon physical injuries allegedly caused by the defective design, installation, and maintenance of the school's heating and ventilation system.[50] The court of appeals upheld the trial court's judgment for the engineering firm finding the action barred by the six-year statute of limitations. This limit was not seen to deprive the plaintiffs of their due process rights, even though the cause of their injuries was not discovered until after the period had run.

In California, a student and his parents brought action against the school district and teacher for sexual abuse.[51] The trial court granted a motion for nonsuit on the basis of failure to timely state a cause of action, and the plaintiffs appealed. The court of appeals reversed the motion holding that a cause of action based on the sexual assault of a minor by his teacher is deemed to accrue at the time the parent discovers or should have discovered the assault. Although the court was not aware of a case discussing delayed accrual of a cause of action for child sexual abuse, it stated that it cannot be law that a public school teacher could molest a minor student and successfully threaten the child long enough

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49. Roberts v. Peterson, 355 S.E.2d 280 (S.C. Ct. App. 1987).

50. Fennell v. John J. Nesbitt, Inc., 398 N.W.2d 4881 (Mich. Ct. App. 1986).

51. John R. v. Oakland Unified School Dist., 240 Cal. Rptr. 319 (Ct. App. 1987). *But see* Katz v. Rockville Centre Union Free School Dist., 516 N.Y.S.2d 289 (App. Div. 1987) (student failed to adequately explain the unreasonable delay in bringing the proceeding for leave to serve a notice of claim until nearly three years later); San Bernardino City Unified School Dist. v. Superior Court, 235 Cal. Rptr. 356 (Ct. App. 1987) (where a trial court's refusal to set a preferential trial date was upheld, even though the request was made before the expiration of a three-year limitation period); and Mulligan v. Farmingdale School Dist. No. 22, 519 N.Y.S.2d 725 (App. Div. 1987) (court denied school district's request to consolidate negligence action with separate action for medical malpractice when request did not come until the negligence action was scheduled).

to bar the child's claim. In addition, the court saw the assault as arising out of the job-created authority over the student, and therefore could impose liability on the school district.

The applicability of a notice of claim requirement was the basis for a decision in a negligence action involving a Maryland pupil.[52] The child was injured when he fell into a hole on his school's playground. After the trial court dismissed the claim, the Maryland Court of Special Appeals remanded the case finding that the 180 day notice of claim did not apply to county boards of education. Such boards were determined to be essentially state agencies and therefore not subject to the notice of claim requirements for county or municipal corporations. The court stated that the notice requirements of the Tort Claims Act also did not apply, adding that the defense of sovereign immunity may be available to the board.

In a suit arising from a chain-reaction collision caused by a school bus, the Supreme Court of Oklahoma reversed a district court decision and found a partial settlement not to be a denial of claim.[53] Such a denial would have triggered a six-month time limit for the commencement of action. The court said that a partial settlement, with a promise to settle the rest of a claim, cannot equitably lull an adversary into a false sense of security and thereby subject the claim to a statute of limitations.

A Tennessee county board of education brought suit against a manufacturer of ceiling materials containing asbestos to recover the cost of removing the material installed in high schools.[54] It had been sixteen years since the installation of the tiles when the action commenced. In a decision which was affirmed by the court of appeals, the district court declared that the state's immunity from the statute of limitations did not apply to the board's warranty action. The basis for the suit was not seen as a necessary part of carrying out a state function.

In a Tennessee case involving warranty claims against manufacturers of products containing asbestos, the district court explained that the statute of limitations does not run against a county seeking to enforce a demand arising out of the exercise of its functions as an arm of the state.[55]

Comparative Negligence. The issue of comparative negligence was involved in a Nebraska case.[56] An action was brought on behalf of a

52. Dean v. Board of Educ., 523 A.2d 1059 (Md. 1987).

53. Whitley v. Oologah School Dist., 741 P.2d 455 (Okla. 1987).

54. Anderson County Bd. of Educ. v. National Gypsum Co., 821 F.2d 1230 (6th Cir. 1987).

55. Johnson County Tenn. v. United States Gypson Co., 664 F. Supp. 1127 (E.D. Tenn. 1985). *See also* Rowan County Bd. of Educ. v. United States Gypsum Co., Inc., 359 S.E.2d 814 (N.C. Ct. App. 1987).

56. Center State Bank v. Dana, Larson, Roubal, 411 N.W.2d 635 (Neb. 1987). *See* Jones v. Sheridan County School Dist., 731 P.2d 29 (Wyo. 1987) (where an accident

thirteen-year-old who was seriously burned in a propane gas explosion. The district court entered judgment on a jury verdict against the architectural firm involved in the planning and construction of the school building where the explosion took place. The Supreme Court of Nebraska accepted the verdict establishing liability and remanded the case for a new trial on the issue of damages. The court determined that the victim neither knew, nor should have known, that the area he was entering into was dangerous. The plaintiff had sought to prove that a thirteen-year-old should have recognized the danger associated with standing near a truck engulfed in a cloud caused by leaking propane gas.

A female junior high school student, who was allegedly group molested in a boy's locker room, sued the board of education, supervising teacher, and individual students.[57] The Maryland trial court's verdict for the student was reversed by the court of appeals and remanded for trial. The court examined the concept of contributory negligence in regards to the fact that the girl had voluntarily entered the locker room. Whether she knew, or should have known, that by entering the locker room she subjected herself to danger was seen as a matter for the jury.

LIABILITY INSURANCE

A Georgia student twisted to avoid being hit a second time during the administration of corporal punishment. This movement caused the principal's blow to cause injury for which damages were sought. The school district's insurer sought to obtain a declaratory judgment that damages in the suit were not covered by the policy. When that was denied by the trial court, appeal was sought with the contention that the insurer was protected from liability by a policy exclusion applicable to bodily injury expected or intended by the insured.[58] The court of appeals upheld the lower court decision by accepting the claim by the principal that the injury was an unintended consequence of the spanking.

A Minnesota cheerleader was injured when a van in which she was travelling to a school sponsored activity was involved in an accident. The court of appeals determined that private liability insurance, which had been purchased by the cheerleader's faculty advisor, did not waive the statutory limits of the school's liability.[59]

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involving a bus driver and a motorist resulted in a jury verdict finding the parties equally at fault).

57. Cambell v. Montgomery County Bd. of Educ., 533 A.2d 9 (Md. 1987).

58. Pennsylvania Millers Mut. Ins. v. Crews, 361 S.E.2d 657 (Ga. Ct. App. 1987).

59. Nelson v. House, 402 N.W.2d 639 (Minn. Ct. App. 1987). In New Milford Bd. of Educ. v. Juliano, 530 A.2d 43 (N.J. Super. Ct. App. Div. 1987) a school district was found entitled to reimbursement for the portion of money paid to an injured student which was

EMPLOYEE INJURIES/WORKERS' COMPENSATION

A negligence action against the board of education was brought on behalf of a New York teacher for injuries sustained when she was attacked by a student.[60] The teacher had requested that a student who had threatened her be removed from her class. Sixteen days before the attack the teacher was advised that a support team had recommended the student's transfer to a special education program. The trial court's decision for the district was affirmed by the court of appeals. The defendants were not found to have assumed an affirmative duty to protect the teacher from the student in question. Furthermore, the defendants had initiated a process by which the student would be removed from the class, but did not notify her that the student would actually be removed.

A Wyoming school bus driver, who was injured when the parking brake on the bus she was driving failed, brought suit claiming that mechanics and co-workers who serviced the bus were negligent.[61] The driver claimed that the defendants knew that the parking brake needed adjustment, failed to repair the brake, and yet allowed her to drive the bus. In affirming the district court judgment for the defendants, the Supreme Court of Wyoming explained that since the driver was covered by worker's compensation, she could only have recovered against her co-employees if they were culpably negligent. This, the court explained, would require that the co-workers had engaged in willful misconduct with a state of mind that approached intent to do harm.

In New York, a teacher was sexually assaulted in the faculty ladies room. The room generally was kept locked and the plaintiff had entered it by using her own key. The assailant was never caught and the manner in which he entered the room was never determined. In her action

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attributable to a physician's medical malpractice. In School Bd. of Broward County v. City of Sunrise, 510 So. 2d 641 (Fla. Dist. Ct. App. 1987) while a city was not required to insure school board, the fact the board was added to the policy provided coverage). For additional cases related to liability insurance, largely decided on technical grounds, *see* Maglio v. NECA-IBEW Welfare Trust Fund, 506 So. 2d 447 (Fla. Dist. Ct. App. 1987), Ferrell v. Southern Farm Bureau Casualty Ins. Co., 724 S.W.2d 465 (Ark. 1987), and Industrial Indem. Co. v. Beeson, 736 P.2d 800 (Ariz. Ct. App. 1986).

60. Meister v. City of New York, 519 N.Y.S.2d 665 (App. Div. 1987). *See also* Zemsky v. City of New York, 821 F.2d 148 (2d Cir. 1987) (court dismissed civil rights action by teacher who alleged that school officials failed to take disciplinary action against assaultive students).

61. Stundon v. Sterling, 736 P.2d 317 (Wyo. 1987). *See* Hoover v. Charlotte-Mecklenburg Bd. of Educ., 361 S.E.2d 93 (N.C. Ct. App. 1987) (school board was not negligent in maintenance, repair, or operation of school bus which was involved in a serious accident when its rear wheels fell off, and brakes failed to work). Benefits also were denied in Youngblood v. Sanders, 513 So. 2d 521 (La. Ct. App. 1987) (where physical circumstances together with bus aide's incredibility supported conclusion that her injuries were not caused by accident between bus and automobile).

against the city, the plaintiff sought to establish that her injuries were proximately caused by the defendants' negligent failure to maintain their premises in a reasonably safe manner.[62] It was alleged that the defendants had maintained a system of distributing keys that was so inadequate that keys were likely to fall into unauthorized hands, making it foreseeable that such a violent intrusion would occur. The trial court found in favor of the teacher. The court of appeals reversed that decision finding that the alleged negligence did not stem from failure to fulfill a proprietary duty, but rather from the defendants' exercise of their governmental functions. The court saw it as well established that the provision of security against attacks from third parties is a governmental function from which no liability arises, absent a showing of a special duty of protection. No such duty was recognized in this case.

A parent who had participated at a school picnic in Louisiana was convicted of aggravated battery following an incident involving the school's principal. Following an exchange with the female participant regarding the consumption of alcohol during the event, the contents of a wine glass were thrown in the principal's face. The defendant then struck the principal in the face with the glass, shattering it and severely cutting her face. The court of appeals affirmed the conviction holding admissible (1) the testimony that the defendant was drunk as state of mind evidence, (2) the wine glass allegedly used in the attack, and (3) a photograph showing the extent of the principal's injuries. Additionally, a sentence of six years at hard labor was not seen as inherently excessive.[63]

During the school day, a junior high school teacher in Oregon left the school building to deliver two boxes of school-related papers to his home. He was accompanied by a former student who had gone to the school to discuss some personal problems with the teacher. While helping the teacher carry the boxes to the porch of his home, the student accidentally hit his eye with her elbow causing damage to the eye. The teacher sought review of the workers' compensation board ruling which denied him benefits.[64] The court of appeals reversed that decision finding the injury work-related. The teacher's activity was seen as beneficial to the school, and the requirement that teachers sign out when they leave the school during school hours was held to acquiesce in his activity.

Whether a teacher's attendance at a school math club outing was an implied requirement of employment was the central issue in a workers'

62. Marlyn S. v. City of New York, 521 N.Y.S.2d 485 (App. Div. 1987).
63. State v. Francosi, 511 So. 2d 1181 (La. Ct. App. 1987).
64. Preston v. Saif, 745 P.2d 783 (Or. Ct. App. 1987).

compensation case.[65] The teacher's wife sought benefits in connection with an injury which resulted in the teacher's death. The California Supreme Court reviewed the earlier determinations that benefits be denied. Although evidence was presented that the teacher's attendance was not mandatory, the court felt that as a temporary teacher he was vulnerable to pressure to participate in extracurricular activities. Although the school was only minimally involved in the outing, teachers were encouraged to involve themselves in such events. Explaining that the labor code provides that workers' compensation laws "shall be liberally construed by the courts with the purpose of extending their benefits,"[66] the court held that the employee should be compensated.

A shop teacher, who had been exposed to excessive noise for fourteen years, sought disability benefits for his hearing loss.[67] A Colorado court of appeals upheld the Industrial Commission's conclusion that the loss was a compensable occupational disease. Medical evidence supported the finding that the hearing loss was noise induced, and the school employment was found to have been the last injurious exposure.

A security worker in an Alaskan school district was denied workers' compensation benefits for disability due to emotional distress and back injury. At trial, the decision by the workers' compensation board was affirmed. After the claimant committed suicide, his widow appealed that decision.[68] The Supreme Court of Alaska reversed the part of the decision related to the stress claim. The fact that the worker had other sources of stress was not found to detract from the assertion that stress significantly contributed to his illness. The workers' compensation board had used the "unusual stress in the profession test."[69] The court rejected the applicability of this test holding that an employer cannot dismiss one employee's response to job stress because other employees do not become disabled in response to identical stress.

In Colorado, a tenured teacher claimed that her strongly expressed support for the expansion of the district's foreign language program evoked retaliatory actions against her by the principal and superintendent. In particular, the teacher claimed to have been unfairly reprimanded, harassed, and demoted from her position of full-time teacher

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65. Smith v. Workers' Compensation Bd., 236 Cal. Rptr. 248 (Ct. App. 1987).

66. *Id.* at 258.

67. Jefferson County Schools v. Headrick, 734 P.2d 659 (Colo. Ct. App. 1986).

68. Wade v. Anchorage School Dist., 741 P.2d 634 (Alaska 1987). *See* Dougherty County Bd. of Educ. v. Lundy, 359 S.E.2d 403 (Ga. Ct. App. 1987) (worker not entitled to compensation due to lack of physical injury to support her claim of psychological injury). *But see* Hicks v. Putnam County School Bd., 510 So. 2d 1171 (Fla. Dist. Ct. App. 1987) (where no effective date of maximum medical improvement was established, claimant could not have her claim of psychiatric care and treatment barred).

69. *See* Delaney v. Alaska Airlines, 693 P.2d 859, 864 (Alaska 1985).

to that of permanent substitute teacher. When the superintendent discovered the teacher was tape-recording a discussion with him, he allegedly assaulted her and threw her to the ground in an effort to confiscate the recorder. The defendants sought a summary judgment on the teacher's claim of infringement of her first amendment rights, and claims of assault and outrageous conduct. The district court denied the motion finding the emotional injuries allegedly sustained by the teacher did not arise out of her employment, and were not the type to be covered by workers' compensation. The questions of fact precluded a summary judgment on the other charges.[70]

A ground maintenance worker brought a workers' compensation action against his Texas school district for injuries incurred while driving a tractor mower.[71] The school district appealed the trial court's decision that the worker was totally and permanently injured. The worker had stayed at the same job doing essentially the same work for two years after his injury. The court of appeals recognized that the worker was only qualified to do menial work, and understood how he could have tried to continue to work without complaining of pain. In finding for the worker, the court explained that "a person is totally disabled when he is disqualified from performing the usual acts of a workman in such a way as to enable him to procure and retain employment."[72]

A Pennsylvania worker who was declared totally disabled by the Workman's Compensation Appeals Board faced an appeal of his award.[73] The employer contended that a causal relationship between the injury and the workplace had not been established. In affirming the award, the court determined that the lung damage incurred by the worker was a direct result to chlorine fumes inhaled at the workplace. The worker was not required to prove that the incidence of his injury was substantially greater in his industry or occupation than in the general population.

In an attempt to raise her workers' compensation benefits, a former school custodian disputed the method by which those benefits were calculated. The extent of her permanent disability was measured by the difference between her average pre-injury wage and the post-injury wage she received when the injury stabilized. In the appeal of her award, the plaintiff claimed that the workers' compensation board based her earning capacity on wages from three years before, which did

70. Kirk v. Smith, 674 F. Supp. 803 (D. Colo. 1987).
71. Northeast Indep. School Dist. v. Hayes, 727 S.W.2d 25 (Tex. Ct. App. 1987).
72. *Id.* at 27.
73. Pittsburg Bd. of Educ. v. WCAB, 529 A.2d 1166 (Pa. Commw. Ct. 1987). For a case in which an employer was found to have arbitrarily discontinued benefits see Lutz v. Jefferson Parish School Bd., 503 So. 2d 106 (La. Ct. App. 1987).

not reflect the full amount of her earnings loss. The Supreme Court of Alaska accepted that analysis in upholding the lower court findings, but agreed that the worker did not demonstrate exceptional circumstances meriting a lump sum award.[74]

A cafeteria worker in Texas appealed a district court decision that she was not entitled to workers' compensation benefits for a job-related injury.[75] The worker had filed an interrogatory asking for the names of all persons the school district planned to call as witnesses. At the trial, the district produced an "expert witness" who was allowed to testify over the objection of the plaintiff. In reversing the lower court decision and remanding the case for trial, the Supreme Court of Texas disagreed with the holding that "witnesses" and "expert witnesses" are completely separate concepts. The surprise witness should not have been allowed to testify without a showing of good cause. This error amounted to a denial of the worker's rights leading to an improper judgment.

A Pennsylvania teacher sought workers' compensation benefits following an assault during the course of her employment.[76] Benefits were granted and both the claimant and school district petitioned for review. The court made determinations in three areas. First, there was a question of the appropriateness of the award of forty weeks compensation for the teacher's disfigurement. The court upheld the award on the basis that the amount of an award for disfigurement is a question of fact which cannot be disturbed unless there has been an inadequate description of the disfigurement. Second, since there was evidence that the employer failed to effectuate the claim for compensation, the court reversed the compensation board on the matter of penalties. The school district's unreasonable delay was found to warrant a 20% penalty per

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74. Fairbanks North Star Borough School Dist. v. Crider, 736 P.2d 770 (Alaska 1987). *See also* Duran v. Albuquerque Pub. Schools, 731 P.2d 1341 (N.M. Ct. App. 1986) (disabled educational aide's request to have her workers' compensation benefits calculated on the basis of a 52-week work year rather than the 40-week work year which she actually worked was denied); North Clackamas School Dist. v. White, 737 P.2d 649 (Or. Ct. App. 1987) (employer successfully sought review of workers' compensation board decision which upheld employee's claim of aggravation of original injury); and Cormier v. Lafayette Parish School Bd., 508 So. 2d 207 (La. Ct. App. 1987) (employee who was granted sabbatical leave while receiving workers' compensation benefits was not entitled to benefits during the leave).

75. Gutierrez v. Dallas Indep. School Dist., 729 S.W.2d 691 (Tex. 1987). *See* Gutierrez v. Dallas Indep. School Dist., 722 S.W.2d 530 (Tex. 1986) (where trial court was not found in error for allowing testimony when an employee seeking disability benefits had not specifically requested the school district list its expert witnesses).

76. School Dist. of Philadelphia v. WCAB, 531 A.2d 547 (Pa. Commw. Ct. 1987). *See* White v. Naquin, 500 So. 2d 436 (La. Ct. App. 1986) (where a school district, which had paid workers' compensation benefits to a school bus driver who was injured when tripped by a student, was not required to indemnify the third party held liable for damages to the employee).

annum on the compensation. Third, the school district claimed entitlement to a 100% credit for sickness and accident benefits paid the teacher during her disability. The court explained that the crucial factor is the identity of the party who is paying the insurance premiums. Since the employer and the teacher each paid half, the 50% credit awarded to the district was upheld.

ASSAULT AND BATTERY

The constitutionality of a Florida assault and battery statute was challenged in a case where a parent appealed his conviction of battery upon a school board employee.[77] The appellant claimed that the statutory division of people, for sentencing purposes, into two classes (those subject to the discipline of the school and those who are not) violated the equal protection clause and was void for vagueness. Significant to the issue was the fact that the penalty for battery under the statute was significantly harsher than battery under a statute which did not involve school employees. In upholding the constitutionality of the statute, the court recognized the intent to maintain and protect the integrity of the school setting and the standing of teachers as role models. By helping to insulate the state's school children from violence, the court found that legitimate state interests were fulfilled and thus an elite class had not been established.

In Illinois, a teacher and principal were charged with battery in connection with the infliction of corporal punishment on a sixth-grade student.[78] The trial court entered judgment on a jury verdict in favor of the teacher and convicting the principal of battery on the basis of accountability. The punishment, which involved a total of twenty-four blows with an oak paddle, was administered by the teacher and seen by the court as excessive. The appeals court affirmed that decision on the basis that (1) the principal was responsible for discipline at the school, (2) the punishment took place in the principal's office with the principal acting as witness, and (3) at no time did the principal oppose the conduct of the teacher.

DEFAMATION

Following the publication of a newspaper article, a California teacher brought an action against the paper alleging an invasion of his pri-

77. Walker v. State, 501 So. 2d 156 (Fla. Dist. Ct. App. 1987).

78. People v. Wehmeyer, 509 N.E.2d 605 (Ill. App. Ct. 1987). *See* Friedland v. Ambach, 522 N.Y.S.2d 696 (App. Div. 1987) (dismissal of teacher supported by evidence that teacher improperly administered corporal punishment to second grade students).

vacy.[79] The article told of a suit the teacher had brought against his principal in which he claimed an evaluation report libeled him, and how ten years before the teacher had been acquitted of murdering his wife. The teacher's complaint that the newspaper invaded his privacy and intentionally inflicted emotional distress was denied. The court of appeals explained that a cause of action for invasion of privacy requires a public disclosure of private facts which are offensive and objectionable to a reasonable person of ordinary sensibilities.[80] However, there is not necessarily a right to privacy of a matter of general interest which has already been publicly released. In this case the facts of the wife's death had been fully reported, as had the teacher's numerous public lawsuits which related to the incident. The court found that newsworthiness had been established as a matter of law.

A substitute teacher brought an action for libel, slander, and harassment in connection with a letter sent by the principal of a Pennsylvania high school.[81] The letter said the services of the teacher would no longer be required because of problems the substitute had following lesson plans, keeping attendance, and preparing daily activity reports. The trial court's decision against the teacher was affirmed by the appeals court. The statements in the letter were not seen as criticisms of the teacher's skills as a teacher, but rather commented on his adherence to administrative policies. The only other persons who received the notice were the directors of personnel and secondary education who, the court felt, could be expected to properly interpret the remarks. No basis for libel or slander were found. Similarly, the plaintiff failed to allege facts which would create a tort for harassment as the letter would have to be without legitimate purpose, or written merely for the purpose to annoy.

Following misconduct on a school-sponsored field trip in Pennsylvania, the principal sent to a student's parents and to the school board notification of the student's suspension. That action was the basis for a claim against the principal for defamation and the intentional infliction of emotional distress. The appeals court affirmed the lower court's dismissal of the action.[82] The principal's conduct was not determined to be an exception to immunity as he had not acted with actual malice or willful misconduct. There was no publication of defamatory material to one not required to receive the notice by statute. Finally, there was no willful misconduct by the principal in sending a notice of suspension that he was required by law to send.

In New York, a mother sought damages from her daughter's teacher

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79. Waser v. San Diego Union, 236 Cal. Rptr. 772 (Ct. App. 1987).
80. *Id.* at 775.
81. Sobel v. Wingard, 531 A.2d 520 (Pa. Super. Ct. 1987).
82. Keeler v. Everett Area School Dist., 533 A.2d 836 (Pa. Commw. Ct. 1987).

and school district for slanderous statements made by the teacher.[83] During a discussion in a seventh grade reading class, the teacher commented on having taught the student's mother, who was forced to leave school because of pregnancy. The trial court refused the school district's motion for a summary judgment and the district appealed. That order was affirmed when the appellant court found the issue triable. The court reminded that an employer may be held vicariously liable for a tort committed by an employee in the course of his duties, and that actionable wrongs for which an employer may be held liable include slander.

Communications from the superintendent of schools to the school board were the basis for a libel and slander action by an elementary school principal in Michigan.[84] The defendant superintendent had sought to have the plaintiff separated from his employment with the school district. The trial court denied the defendant's motion for summary judgment on the grounds of absolute or qualified privilege. The court explained that absolute privilege is confined to cases involving (1) the proceedings of legislative bodies, (2) judicial proceedings, and (3) communications by military and naval officers. In upholding the lower court, the court of appeals assumed the existence of qualified privilege. To prevail in a suit where such privilege exists, the plaintiff must show actual malice. The court concluded that the plaintiff should have the opportunity to show actual malice at a trial.

TORTIOUS INTERFERENCE WITH A CONTRACT

In Connecticut, the failure of a school board to rehire a nontenured teacher resulted in an action seeking damages premised on liability for breach of contract and negligent misrepresentation.[85] The principal had told the teacher that she should plan on returning the next year, and he posted a notice stating that all present faculty members would be offered contracts. The Connecticut Supreme Court upheld the appellate court decision that the principal's actions did not impose contractual liability. However, the appellate decision on negligent misrepresentation was reversed. The holding was that the defendant school board and principal knew, or should have known, that hiring plans would be contingent upon declining student levels for the following year. The employer had failed to exercise reasonable care in making representations upon which the employee had relied.

The issue raised in a case emanating from Rhode Island was whether

83. Murry v. Watervliet City School Dist., 515 N.Y.S.2d 150 (App. Div. 1987).
84. Grostick v. Ellsworth, 404 N.W.2d 685 (Mich. Ct. App. 1987).
85. D'Ulisse-Cupo v. Board of Directors, 520 A.2d 217 (Conn. 1987).

a municipality was vicariously liable for the actions of its school superintendent.[86] The plaintiff, a terminal manager of the company which provided bus transportation for the municipality, sought damages for a tortious interference with his contractual rights. Two days before he was fired, the plaintiff's employer received a letter from the school superintendent seeking the plaintiff's discharge. The lower court determination that the municipality could not be held liable for the actions of the superintendent was reversed by the state's supreme court. School committees carrying out functions assigned to them were determined to be exercising a portion of the state's sovereignty. And, while not state agencies, the court considered them municipal bodies and their employees municipal employees. The court disagreed with the contention that the town could avoid liability for the tortious acts of its municipal employees.

PRODUCTS LIABILITY

A Rhode Island student was killed when he was struck on the head by a descending garage door while attending an automobile repair class. The resulting action centered on two elements: (1) whether a municipal department, like the school committee, could properly be named in the action, and (2) a products liability claim against the manufacturer of the garage door opener.[87] The trial court's ruling was affirmed on both aspects of the case. In the first instance, the court explained that in a suit against a department the municipality is the proper party to name. On the products liability claim, no defect in the design or manufacture of the product was found which would make the product unsafe for its intended use. The court explained that "while reasonable inferences can be drawn from the evidence in situations where direct proof is not available, these inferences may not rely on mere conjectures or speculations."[88]

A custodian of a New York City intermediate school was found dead on the floor of the school boiler room with a wrench in his hand. His widow brought suit against the designer of the boiler room, the general contractors, and the mechanical contractor, contending that her husband's death was the result of negligent design and construction of the boiler room. However, the court failed to find a proximate cause

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86. Mellor v. Clancy, 520 A.2d 1278 (R.I. 1987).

87. Peters v. Jim Walter Door Sales of Tampa, 525 A.2d 46 (R.I. 1987).

88. *Id.* at 49. *See* Catasauqua Area School Dist. v. Raymark Industries Inc., 662 F. Supp. 64 (E.D. Pa. 1987) (court failed to find any of various commercial defendants liable for damages incurred by asbestos abatement).

between the design and construction and the death of the custodian, and therefore held against the widow.[89]

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

An Ohio eighth-grade student, who was disciplined for taking an extra towel during gym class, brought an action alleging the intentional infliction of emotional distress.[90] After laughing at the teacher and refusing to return the towel, the student was ordered to do twenty-five push-ups. Still naked, the student asked if he could go to his locker and put on his shorts before complying. With his request denied the student began doing the pushups, during which time he claimed the teacher taunted him. At trial, another student testified that the taunt came from a student. The court of appeals affirmed the trial court's decision in favor of the school board and teacher. The action by the teacher was not seen as extreme and outrageous. Furthermore, although the student may have been embarrassed, such feelings were not considered to reach the level of severe emotional distress.

In Michigan, a former teacher brought an action against her school board after she was given an unsatisfactory job performance evaluation.[91] She alleged negligent evaluation, conspiracy, and intentional infliction of emotional distress. The circuit court denied the defendant's motion for a summary judgment and the district appealed. In finding against the teacher, the court could not find any conduct which would constitute a tort. The teacher alleged the evaluations were undertaken with an intent of getting her to leave. The court explained that since the district was privileged to evaluate the plaintiff's classroom performance, it could not be held liable for intentional infliction of emotional distress. This was true, even if they knew the evaluations could cause emotional distress. At best, the district was negligent in following procedures set forth in the collective bargaining agreement.

The state of Arkansas has a teacher-testing program which is required by state law. A teacher, whose test scores were mailed to another teacher by the computer company hired to score the tests, brought an action against that company.[92] She claimed negligence, violation of statute, invasion of privacy, and outrageous conduct resulting in extreme emotional distress. The teacher appealed the district court summary

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89. Ferguson v. Abrams, 514 N.Y.S.2d 376 (App. Div. 1987). *See* Massie v. Persson, 729 S.W.2d 448 (Ky. Ct. App. 1987) (judgment for construction defendants upheld as the failure of a coach to properly install whirlpool found to be the substantial factor in a student's electrocution).

90. Jackson v. Board of Educ., 504 N.E.2d 1144 (Ohio Ct. App. 1985).

91. Sankar v. Detroit Bd. of Educ., 409 N.W.2d 213 (Mich. Ct. App. 1987).

92. Wood v. National Computer Sys. Inc., 814 F.2d 544 (8th Cir. 1987).

judgment for the computer company. The court of appeals agreed that the company had been negligent, but did not find the negligence to meet the standard of being atrocious or exceeding all possible bounds of decency. Furthermore, absent physical injury, Arkansas law does not recognize cause of action for negligent infliction of emotional distress. As to the invasion of privacy, the disclosure of the plaintiff's score to one other person was not found to be highly objectionable.

A New York principal was suspended from his tenured position and brought an action against the school district.[93] His claim of a deprivation of his constitutional rights to liberty and property was denied by the trial court. However, in a decision which was upheld by the court of appeals, the principal was found to have stated a valid cause of action for defamation and the intentional infliction of emotional distress. The plaintiff alleged that the school board had spread false rumors that he had been involved in an affair with an associate, that he had used student funds for his own benefit, and that he had used associates to perform work on his home during school hours. The court explained that board members are only immune for statements made in the discharge of their quasi-judicial duties. The statements were not found to be protected by privilege, and it was a matter for the jury to determine if they were defamatory.

The student editor of a school yearbook in Massachusetts brought an action to recover for damages for emotional distress, and for related costs of psychological counseling allegedly necessitated by the actions of school staff members.[94] Shortly after the student was appointed editor of the school yearbook, a former student was discovered to be larcenously selling advertising space to local merchants. The plaintiff was suspected as an accomplice in the fraud and removed as editor. When an investigation concluded that he had not been involved, the student was reinstated as editor. Nevertheless, certain members of the school's staff and administration disseminated, or permitted to be disseminated, allegations of the student's complicity. When the yearbook was published, it was found to contain hostile comments by yearbook staff members (presumably students) carrying the innuendo that the plaintiff had been a party to the fraud. In affirming the trial court's decision to dismiss the case, the court of appeals pointed to the dilemma faced by the plaintiff. If he established that members of the school staff committed negligent infliction of emotional distress he would lose because there was no claim of physical harm. If he established that the

93. Sullivan v. Board of Educ. of the Eastchester Union Free School Dist., 517 N.Y.S.2d 197 (App. Div. 1987).

94. Tilton v. Town of Franklin, 506 N.E.2d 897 (Mass. App. Ct. 1987).

school staff committed an intentional infliction of emotional distress, he would lose because the defense of sovereign immunity had not been waived with respect to that tort by the Massachusetts Tort Claims Act. Faced with this the action was framed as one for "reckless infliction of emotional distress," which the plaintiff claimed was a tort distinct from intentional infliction of emotional distress and thus not barred under the Tort Claims Act. In rejecting that claim, the court found the essence of wanton or reckless conduct to be intentional conduct with a commission or omission where there was a duty to act.

CONSTITUTIONAL TORTS

Several individual peace activists and a coalition of peace organizations brought an action following a ban on their participation on "career days" in the Atlanta public schools.[95] The complaint alleged that there had been a violation of the activists' first and fourteenth amendment rights when they were denied the use of established channels to present information to students. The court identified three categories of government property: (1) traditional public forums which have long been devoted to assembly and debate; (2) designated, created, or limited public forums which are opened to the public for an expressed activity; and (3) nonpublic forums. In traditional and designated public forums, speakers can be excluded on the basis of the content of their message only when the exclusion is necessary to serve a compelling state interest. The court explained that, even in a nonpublic forum, it is a denial of first amendment rights if a speaker is denied access solely to suppress the viewpoint he espouses.

The court found the activists' peace oriented educational and career opportunity information consistent with that generally provided to guidance offices, bulletin boards, and career days. At the same time the court rejected the argument that the recruiting needs of the military justified preferential access to military recruiters and personnel.

Student Initiated Cases

In South Dakota, a section 1983 action was brought against a second grade teacher, her principal, and the superintendent of schools.[96] The action alleged substantive due process violations as a result of physical and emotional abuse which stemmed from corporal punishment. The

95. Searcey v. Crim, 815 F.2d 1389 (11th Cir. 1987). *Cf.* Burk v. Unified School Dist. No. 329, 116 F.R.D. 16 (D. Kan. 1987) (where plaintiff was entitled to recover costs, even though no monetary loss was suffered, when jury had found district denied his right to due process).

96. Rubek v. Barnhart, 814 F.2d 1283 (8th Cir. 1987).

teacher had slapped and kicked several of her students, called them derogatory names, and hit them with a wooden paddle. Parents had complained on several occasions to either the principal or the superintendent. The district court granted a directed verdict in favor of the principal and superintendent on the section 1983 action, but the action against the teacher went to a jury trial. There, the teacher was found guilty of assault and battery and intentional infliction of emotional distress. However, the jury found in her favor on the section 1983 issue. On appeal of the action against the principal and superintendent, the circuit court explained that the jury's finding that the teacher had not violated the children's constitutional rights prevented consideration of such an action against those administrators. While deploring the actions complained of, the court reminded that not every violation of state tort or criminal assault laws committed by a state officials results in a constitutional violation.

A civil rights action was brought on behalf of a hyperactive and emotionally disturbed student against an Indiana school system, school board, principal, and teacher alleging that discipline techniques employed violated his equal protection and due process rights.[97] Indiana law authorizes the use of moderate corporal punishment subject to meeting four tests: (1) the teacher must have the general authority to inflict corporate punishment on the pupil; (2) the rule violated must be within the scope of the educational function; (3) the violator of the rule must be the one punished; and (4) the punishment inflicted must be in proportion to the gravity of the offense. The district court analyzed the variety of techniques the school employed in an effort to discipline the student, including: paddling, which was not found to be excessive; isolated seating, which was seen as relatively innocuous and warranted; and taping the student's mouth, which was actually done by the student himself and, while not exemplary, did not exceed the bounds of common law. Explaining that handicapped children are not entitled to any unique exemptions or protections from a school's disciplinary procedures, the court agreed that the plaintiff received the same punishment any other child would have received. Since the plaintiff was unable to establish any interests which were fundamental to an equal protection analysis, the defendants only needed to show that there was a rational basis for their conduct. The examination of the evidence by the court showed such a basis.

Whether corporal punishment of a school child can violate substantive constitutional rights under the due process clause, was the issue in a case from New Mexico.[98] The district court decision that school officials

97. Cole v. Greenfield-Cent. Community Schools, 657 F. Supp. 56 (S.D. Ind. 1986).
98. Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987).

were protected by qualified immunity was reversed by the court of appeals. The high threshold for recovery on a constitutional tort for excessive corporal punishment was recognized by the court. However, the allegations that a nine-year-old was held up by her ankles and hit several times with a split board on the front of her legs until they bled was found to be sufficient. A second beating of the same child, which resulted in bruises an examining nurse said she would have reported as child abuse if they were received at home, were also found sufficient. Recognizing that the claims might not hold up at trial, the court still determined they overcame the defendant's motion for a summary judgment.

Female students brought a section 1983 action against a Missouri board of education, teacher, and another nonsupervisory teacher alleging a deprivation of their civil rights as a result of sexual abuse by the teacher.[99] The district court explained that a local governmental entity cannot be found liable under section 1983 for an injury inflicted solely by its employees. There must be a causal connection between the misconduct complained of and the governmental entity being sued. Mere negligent inaction, rather than deliberate indifference to a pattern of unconstitutional conduct, will not suffice. In denying the motion to dismiss, the court found the board had failed to receive, investigate, and act upon complaints concerning the teacher's misconduct. In addition, despite its general knowledge of incidents involving sexual abuse, the board failed to develop administrative policies or provide training for the detection of such incidents. These acts and omissions were seen to be undertaken with a callous and deliberate indifference to the plaintiff's rights. There was, however, no recovery under section 1983 against the other teacher for failure to report her knowledge of the sexual abuse. The court explained that generally speaking there is no duty which flows from one individual to another to protect the other from harm. The plaintiffs failed to assert a duty created by the Missouri child abuse reporting statute as it created a duty owed to the general public, not to specific individuals.

A female member of a Pennsylvania high school band brought a section 1983 action against the school district and officials for injuries arising from sexual assaults by the band's director.[100] Comparing a student's right to be free from the physical abuse of excessive corporal punishment, the district court held that the band member had a liberty interest entitled to constitutional protection in being free from constant threats, sexual abuse, and sexual harassment. Issues of fact regarding

99. Thelma D. v. Board of Educ., 669 F. Supp. 947 (E.D. Mo. 1987).
100. Stoneking v. Bradford Area School Dist., 667 F. Supp. 1088 (W.D. Pa. 1987).

school district practices, which may have made the injury possible, precluded the summary judgment sought by the district, as well as an immunity defense.

A Wisconsin student and his parents filed suit against a school district alleging that the district negligently allowed a homosexual relationship to develop between the student and a teacher.[101] The complaint also stated a section 1983 action claiming a violation of the student's constitutional rights. The circuit court decision for the defendants was appealed. In upholding that decision, the court of appeals examined the premise that the district had in essence a "policy" against teachers sexually assaulting students and that its employees had been negligent in carrying out that policy. The court recognized that no school board member would disagree with the proposition that such acts are improper. However, this did not establish a specific policy which was negligently implemented.

With regards to the section 1983 claim, to rise to the level of gross negligence or deliberate indifference, the evidence must show that the district (1) knew, or should have known, that the teacher was engaging in unconstitutional behavior and (2) failed to take remedial action. In this case the student had taken pains to hide the relationship, and there was simply no evidence that the district had any knowledge of it. Additionally, there was no evidence the district knew of the likelihood of such activities involving the teacher. Finally, the district avoided municipal liability as there was no pattern of constitutionally offensive acts followed by a failure to invoke remedial measures.

A student who was beaten unconscious while riding home on his school bus brought a section 1983 action against his Texas school district and bus driver.[102] The contention was that the student was deprived of his liberty interest when the driver failed to stop several students from beating him, and by failure of the school district to properly train its drivers. The district court granted a summary judgment for the school district. The court of appeals agreed that the plaintiff's claim against the district was barred, explaining that any negligence by the school district did not focus on an identifiable group or individual. There was no support for a finding of gross negligence or deliberate indifference to the constitutional rights of students. The court reversed the part of the decision dealing with the bus driver, and remanded the case. The sequence of events, including when he took action to stop the fight, were seen as questions of fact for the jury.

The right of a second grade student to be free from bodily restraints

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101. Kimpton v. School Dist. of New Lisbon, 405 N.W.2d 740 (Wis. Ct. App. 1987).
102. Lopez v. Houston Indep. School Dist., 817 F.2d 351 (5th Cir. 1987).

was examined in a case also originating in Texas.[103] Using a jump rope, the student's teacher secured the eight-year-old by her waist and legs to a chair. Except for her lunch hour, the student was tied to the chair for an entire day. On the second day, she was again tied to the chair for protracted periods. While tied, the student was denied access to the bathroom. This treatment, which was received by no other student, was not a punishment, but a part of an instructional technique imposed by school policy. The suit alleged that the girl's principal and teacher violated her rights under the fourth, fifth, eighth, and fourteenth amendments. The defendants' claim that no cause was stated upon which relief could be granted was denied by the circuit court, as was their claim to qualified immunity.

In affirming that decision, the court of appeals agreed that the defendants were immune from liability unless their actions violated one or more of the student's constitutional or statutory rights. However, the court recognized that a competent teacher would know, or should have known, that to tie a second-grade student to a chair for an entire day as an educational exercise, was constitutionally impermissible. In particular, "the right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process."[104]

A diabetic student and her mother brought a section 1983 action against the school district, teacher, school nurse, and principal for allegedly depriving the student of needed medical attention and medication.[105] The Pennsylvania district court dismissed all three counts of the suit. The failure of the school district to train and supervise its employees properly, based on a single incident, did not state a section 1983 cause of action. The student could not assert an equal protection claim since, other than being handicapped, she was not a member of a protected class or subjected to unjust and illegal discrimination. Finally, the court held that a section 1983 claim could not be used in an action where the Education of All Handicapped Act was applicable.

Employee Initiated Cases

A nontenured teacher in Colorado brought a section 1983 action alleging that the school district's decision not to renew her teaching contract violated her rights under the first and fourteenth amendments to the Constitution.[106] The plaintiff's claim that her dismissal was for

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103. Jefferson v. Yseleta Indep. School Dist., 817 F.2d 351 (5th Cir. 1987).
104. *Id.* at 305.
105. DeFalco v. Deer Lake School Dist., 663 F. Supp. 1108 (W.D. Pa. 1987).
106. Salida School Dist. R-32-J v. Morrison, 732 P.2d 1160 (Colo. 1987). *See also* Montgomery v. Trinity Indep. School Dist., 809 F.2d 1058 (5th Cir. 1987).

"outspokenness" was upheld in an unemployment compensation hearing, and by the district court. The school district appealed, the decision was upheld by the court of appeals, and then reversed by the Colorado Supreme Court. The state high court explained that in a section 1983 action where there is an alleged violation of first amendment rights, "the employee must establish that constitutionally protected conduct was a substantial, motivating factor in the employer's decision to dismiss the employee."[107] If the employee makes that initial showing, to avoid liability the employer must show the same decision would have been made in the absence of the protected conduct. The court explained that in the context of dismissal controversies, speech is not protected unless it relates to a matter of public concern. As none of the issues related to the plaintiff's claim of unconstitutional discharge was addressed in the unemployment compensation proceeding or subsequent trials, the decision of the court of appeals was reversed and the case remanded.

Teachers of an Arkansas school district brought an action seeking damages for alleged retaliatory actions in response to a letter they wrote to the state department of education.[108] The letter complained of a delay in implementing programs for handicapped students. The principal issue was whether the teachers were exercising constitutionally protected rights of free speech under the first amendment. The district court decision for the teachers was affirmed by the court of appeals. The teachers were found to have been exercising their rights as citizens regarding a matter of public concern.

In another section 1983 case related to a first amendment claim, a tenured Illinois teacher claimed he was fired in retaliation for exercising his right to free speech by reporting criminal misconduct by his superiors.[109] The hearing officer found that the teacher was guilty of conduct that constituted statutory grounds for dismissal which were unrelated to his first amendment claim. After a circuit court affirmed his dismissal, the teacher brought his action before the Seventh Circuit Court of Appeals. That court recognized that the teacher's actions of reporting the misconduct may have angered his superiors. But, in affirming the earlier decision against the teacher, the court determined that although the hearing officer and circuit court may not have properly examined the retaliation issue, such a substantive error did not constitute grounds for reversal.

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107. 732 P.2d at 1165.

108. Southside Pub. Schools v. Hill, 827 F.2d 270 (8th Cir. 1987). *See* Lockhart v. Board of Educ., 735 P.2d 913 (Colo. Ct. App. 1986) (teacher's refusal to perform hall duty, which he asserted stemmed from his belief that such a performance would nullify his teaching precepts, was not considered a matter of public concern so as to be entitled to constitutional protection).

109. Button v. Hardin, 814 F.2d 382 (7th Cir. 1987).

A New York teacher sought monetary and injunctive relief under section 1983 after being removed as the faculty advisor to a school newspaper. The teacher was removed following the publication of a controversial article opposing the proposed federal holiday in honor of Martin Luther King. The plaintiff had worked with the student who wrote the article, even though he disagreed with its content, to make sure it complied with the paper's journalistic standards. The district court held that the teacher had third party standing to seek relief as the students' first amendment rights were seen as inextricably bound with the teacher's role as advisor. In denying the injunction, the court determined that it was an issue of fact as to whether the teacher had a property interest in the position for which he would be entitled to due process protection.[110]

Following a classroom evaluation conducted by a consultant hired by a New York school district, a teacher was advised that he must visit a dentist to improve the condition and appearance of his teeth, and a physician to develop a plan for an appropriate weight loss program. The teacher brought an action against the superintendent of schools and others alleging a section 1983 violation of his rights. When the trial court failed to dismiss the cause of action, the superintendent appealed.[111] The court determined that the teacher failed to establish that the superintendent's conduct infringed upon a protected liberty interest. The superintendent took no steps to compel the teacher's compliance with the directive, and the directive had been effectively negated by the Commissioner of Education.

A former New York school teacher brought a section 1983 action based on the presence of allegedly false and defamatory charges of sexual misconduct with students in his personnel file.[112] The district court ruled that in order for the teacher to establish his liberty interest, he had to prove that the sexual allegations about him were false and that there was an actual disclosure of them to individuals other than those involved in the investigation. Finding the teacher unable to prove actual disclosure of the allegations, the district court granted a summary judgment to the school board. That decision was reversed by the court of appeals which held that the presence of the charges in the teacher's personnel file satisfied the public disclosure requirement because of the likelihood that these charges may be disclosed in the future. In remanding the case, the court said the teacher must be given the opportunity to substantiate his contention that the personnel file is likely to be made

110. Romano v. Harrington, 664 F. Supp. 675 (E.D.N.Y. 1987).
111. Mermer v. Constantine, 520 N.Y.S.2d 264 (App. Div. 1987).
112. Brandt v. Board of Coop. Educ. Servs., 820 F.2d 41 (2d Cir. 1987).

available to prospective employers. With regards to establishing the falsity of the charges, it is only necessary that a plaintiff raise the issue of falsity in order to establish a right to a name-clearing hearing.[113]

113. Codd v. Velger, 429 U.S. 624, 627 (1987).